84-348 (1)

NO. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

W. L. BALLARD

Petitioner

v.

PAUL BLOUNT, individually and In His Official Capacity as Head, Department of English Georgia State University, CLYDE FAULKNER, Individually and In His Official Capacity as Dean, College of Arts and Sciences, Georgia State University; and GLENN G. THOMAS, Individually and In His Former Capacity as Dean, College of Arts and Sciences, Georgia State University

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Julian Huguenin Henry
HENRY & PEARSON
P.O. Box 808
Athens, Georgia 30603
404/546-1395

THE QUESTION PRESENTED FOR REVIEW

Whether a college professor's comments upon academic policy is "protected" speech under the First Amendment to the United States Constitution.

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JURISDICTIONAL STATEMENT

This petition seeks review of the judgment of the United States Court of Appeals for the Eleventh Circuit in W. L. Ballard v. Paul Blount, et al., Case No. 84-8041, entered May 22, 1984. Jurisdiction is conferred upon this Court to review this judgment by writ of certiorari by 28 U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS WHICH CASE INVOLVES

First Amendment to United States Consitution:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C. § 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities

secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

This action was commenced by the filing of a Complaint under the authority of 42 U.S.C. § 1983.

By order of December 12, 1983, the District Court granted defendants' motion for summary judgment and entered judgment in favor of the defendants and against the plaintiff. That judgment was summarily affirmed by Eleventh Circuit Court of Appeals on May 22, 1984.

The order granting summary judgment concluded, inter alia, that plaintiff's speech was unprotected because not relating to matters of "public" concern under the authority of Connick v. Meyers, ___ U.S. ___, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983).

Although summary judgment was also granted on plaintiff's equal protection and due process claims, appellate review has been limited to the First Amendment claim.

Plaintiff was at all relevant times an Associate Professor of English, Georgia State University. Defendant Blount was the head of the English Department and was plaintiff's immediate supervisor. Defendants Thomas and Faulkner were deans of the College of Arts and Sciences and supervisors of the plaintiff. Georgia State University is a public tax supported educational institution administered by the Board of Regents of the University of Georgia. The Board of Regents is an autonomous state agency. It's members are appointed by the Governor for a fixed term.

The express policy of the Georgia State University English Department, as articulated by the defendant Blount, was to encourage the faculty to offer fair criticism and constructive suggestions regarding academic policy

so as to develop a broad base upon which to establish and implement such policy. Consistent with this policy plaintiff, in a uniformly professional and polite manner, engaged in the following communicative activity which the courts below have found to be "unprotected".

A.
THE FRESHMAN ENGLISH SYLLABUS DEBATE

The earliest events reflected in the record arose from the faculty debate over a proposed freshman syllabus in academic year 1976-77. On September 15, 1976, plaintiff prepared a detailed memorandum to the Advisory Council of the Department of English containing certain criticisms and suggestions relating to a proposed new freshmen syllabus. This memorandum predicted academic problems which such a prescribed syllabus would cause

teaching faculty members. Among other things, it also suggested that the proposed syllabus would devalue the research and writing functions of the freshman English course. The tone of the memorandum was professional and polite. This memorandum was presented to the defendant Blount to be forwarded to the members of the Advisory Council of the English Department.

Although the defendant Blount advised plaintiff in writing that he would forward the September 15, 1976 memorandum to both the Freshmen Committee and to the Advisory Council, he has no recollection of doing so, and the memorandum was never, in fact, sent to the Advisory Council. Therefore, plaintiff prepared a memorandum on the topic addressed to the entire faculty of the Department of English. This memorandum objected to certain

procedural irregularities in the processing of the syllabus proposal and elaborated upon the substantive problems which it created. Both this memorandum and its predecessor articulated genuine academic concerns about the proper subject matter to be taught to freshmen students in this public university.

Although the defendant Blount objected to the latter memorandum being circulated to the whole faculty before being exhibited to him and the study committee, he testified that he had no objections to its contents or to the communication of the ideas contained in it. Indeed many of plaintiff's ideas respecting the various issues raised by the proposed syllabus were shared by other faculty members, and his position was ultimately vindicated when the faculty rejected the proposed

syllabus. Thereafter, the legitimate concerns of plaintiff and others were addressed and a new syllabus was adopted.

B.
FRESHMAN AND SOPHOMORE ENGLISH TEACHING ASSIGNMENTS

A second series of events commenced in June of 1977. At that time, plaintiff wrote a letter to the defendant Blount expressing his concerns over the pattern of teaching assignments to freshman and sophomore courses. This letter, dated June 30, 1977, developed a reasoned argument against the continuation of a de facto system under which senior faculty members were regularly assigned graduate and upper division courses, while junior faculty members and graduate teaching assistants were typically assigned freshman and sophomore classes.

A review of this letter is instructive in that it primarily concerned plaintiff's view that reform of the pattern of assignments would have a positive impact upon the morale of the entire faculty (senior and junior) and upon the program as a whole. The letter did not address any objection by plaintiff to his individual teaching assignments. Moreover, it made positive and concrete suggestions regarding proposed departmental policy which would encourage a more even distribution of these assignments. The letter was polite and professional in tone and offered plaintiff's continuing cooperation with and esteem for the defendant Blount. The matters addressed in this letter were also discussed by plaintiff with the Advisory Council.

C.

DEPARTMENTAL NEEDS

On July 29, 1977, plaintiff, speaking as a colleague of Tina Sizemore, an applicant for promotion and tenure, addressed a letter to the chairman of the Dean's Advisory Committee on Promotion and Tenure in support of her application. Plaintiff later learned that Ms. Sizemore had been dismissed despite an apparently favorable recommendation on her application by the Promotion and Tenure Committee. Therefore, plaintiff addressed a succinct letter, dated February 6, 1978, to defendant Blount complaining about Sizemore's dismissal specifically because of the negative impact which that decision would have upon the department's ability to address its needs respecting the teaching of freshman composition. To support his

argument, plaintiff enclosed a New York Times article bemoaning the contemporary de-emphasis on teaching writing skills in educational institutions.

As a result of this letter, plaintiff was called into a meeting with the defendants Blount and Thomas where he was sharply criticized for his attitude. In response to this criticism, plaintiff addressed correspondence dated February 13, 1978, carefully delineating his views regarding departmental personnel needs, particularly with respect to the ability of the department to deliver services in the vital area of freshman composition courses. This letter was an intelligent assessment of the future needs of the department with specific recommendations regarding personnel who could address those needs.

Subsequently, on January 30, 1979, plaintiff again addressed the personnel needs of the department vis-a-vis freshman composition in a letter to Eli Zubay, Vice President for Academic Affairs, supporting tenure applications of two other colleagues.

These events had no adverse impact upon the working relationship between the plaintiff and his superiors. His immediate superior, the defendant Blount, specifically welcomed criticism and constructive suggestions from the plaintiff and denied taking any action against plaintiff for criticizing him or departmental policy.

ARGUMENT

The District Court's order which was adopted by the Eleventh Circuit Court of Appeals decides an important question of federal law in a manner inconsistent with applicable decisions

of this Court and in conflict with a decision on the same issue by the Eight Circuit Court of Appeals. See McGee v. South Pemiscot School Dist. R-V 712 F.2d 339 (8th Cir. 1983):

In essence, the District Court's order construed Connick v. Meyers, 461 U.S. ____ (1983) as a broad mandate which, as applied to the facts here, renders teacher speech on internal college matters "unprotected".

This broad and conclusory application of Connick to the dissimilar facts and circumstances of this case ignores the expressed caveat of the Connick majority:

> We reiterate, however, the caveat we expressed in Pickering, supra, at 569: "Because of the enormous variety of fact situations in which critical statements by... public employees may be thought by their superiors... to furnish grounds for dismissal, we do not deem it either appropriate or feasible to lay down a general standard

against which all such statements may be judged."

A post-Connick Fifth Circuit Court of Appeals decision, Gonzalez v. Benavides, 712 F.2d 142 (5th Cir. 1983), contains an excellent discussion of Connick's contribution to the Pickering[1] calculus and underscores the significance of its caveat. The Court discusses Pickering and its progeny and concludes with the following succinct summary at page 146:

> Thus, the Pickering line socratically accommodated four concerns: first, whether the working relationship between the employer and employee was of such a personal and intimate nature that any public criticism would seriously undermine the effectiveness of the working relationship; second whether the statements were true, false or made with reckless disregard for the truth; third, whether

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[1] Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968).

> the statements undermined the general effectiveness of the work group; and fourth, whether the statements were only critical of policy.

The Court emphasizes in a footnote to this language that it has "consistently treated intimacy of working relationship as the fulcrum of the Pickering balance." Gonzalez, p. 146 n.1.

Gonzalez further recognizes that Connick's significance lay more in its admonition to avoid mechanical formulae than in its discussion of the particularized reasons for finding the complainant's speech there to be of "personal interest" only. The Court explained in the following language at page 147:

> Indeed, the common conceptual strand to much of our First Amendment jurisprudence is context, time, place, and manner. Implicit in this emphasis is that jealous protection of speech rights abjures mechanical response. Connick's relevant contribution to Pickering is

> essentially incremental. First Amendment issues presented by speaking employees are not answerable by mechanical formulae; courts must engage in a weighing exercise, giving "full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public" Id. at ----, 103 S.Ct. at 1692.

Several post-Connick circuit court decisions recognize that the mere fact that speech relates to the internal operation of a public employee's agency does not remove it from the ambit of "public" concern. For instance, a mechanic's criticism of policies and procedures adopted by his employer respecting county motor vehicle operations was "protected" by the Court in Czurlanis v. Albanese, 721 F.2d 98 (3d Cir. 1983).

Another post-Connick decision, McGee v. South Pemiscot School Dist. R-V, 712 F.2d 339 (8th Cir. 1983)

illustrates Connick's inapplicability to a teacher's speech on a matter of public concern which could have a direct impact on the teacher's conditions of employment. There, a track coaches' public opposition to a school board decision to discontinue junior high school track which he coached was found to be protected speech. The plaintiff's public letter discussing the issue contradicted three of six board members' statements that he had recommended discontinuation of the junior high track program. Nevertheless, the Court's Pickering analysis led it to conclude that the speech was protected. The Court distinguished Connick because of the absence in its record of adverse impact upon the teacher's ability to function and upon operation of the school. McGee, p. 342, n.4

Thus, available authority teaches that a proper assessment of the "protectability" of a plaintiff's speech in each case must be determined as an independent matter of law by reference to the content, form, and context of the statements as revealed by the whole record. Moreover, while the effect upon working relationships is a part of the Pickering equation, Connick does not hold that a teacher's speech on educational matters is not protected as suggested by the District Court.[2]

In considering the context of plaintiff's speech here, as juxtaposed to the facts in Connick, it is

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[2] Indeed at least one post-Connick decision has protected legitimate teacher speech on educational matters which completely destroyed the working relationship between the plaintiffs and their supervisors. Bowmann v. Pulaski County Special School District, 723 F.2d 640 (8th Cir. 1983).

important to focus upon the nature of the University system in Georgia. Unlike the district attorney's office under consideration in Connick, a public university in Georgia is not administered by elected officials who are ultimately accountable to the electorate. Nor are University officials accountable to an elected adversarial body such as public utility companies which enjoy state sanctioned monopolies. Rather public universities in Georgia are administered by an appointive Board of Regents. Its members enjoy fixed tenure. It is expressly designed to be removed from the political process. Nevertheless, the system is tax supported.

Because of its traditional autonomy, the public's legitimate interest in access to information concerning the system would be severely

compromised should those possessed of relevant information be muzzled. Indeed, the Pickering Court recognized the unique importance of allowing teachers to speak on matters concerning the operation of public schools. The Court noted at Pickering, page 572:

> Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allocated to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such matters without fear of retaliatory dismisal.

Thus, it is apparent that an important function of the First Amendment's guarantee of free speech is to preserve public access to information concerning governmental operations; particularly regarding government institutions which are insulated from more traditional means of public accountability.

The record sub judice reveals a teacher plaintiff who engaged in an intelligent and articulate debate concerning a proposed freshman English syllabus to be prescribed for all faculty members of the English Department of a state supported university. It also shows a plaintiff who objected to a pattern of teaching assignments which resulted in a disproportionate allocation of experienced and talented teachers to upper level courses to the detriment of an important lower level composition course. The plaintiff simply offered a fair argument in support of allocating teaching resources to an essential component of the teaching mission of this public university. Finally, plaintiff offered his candid comments respecting his professional peers' abilities to address departmental needs; a prerogative

traditionally reserved to tenured college professors.

Each of these matters concerned an issue of political, social or other concern to the public. In each instance, the central theme of the speech related to educational de-evaluation of lower level composition courses. Indeed the argument against the contemporary deemphasis on the teaching of writing skills was a matter of interest in the public arena as evidenced by the New York Times article discussing this issue.[3]

The subject matter of this speech was not tied, as in Connick, to a personal employment dispute between

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[3]Of course, plaintiff's decision to limit his speech to non-public forums is irrelevant if the content of that speech was a matter of general concern. Givhan v. Western Line Consolidated School District 439 U.S. 410, 99 S.Ct. 693, 58 L.Ed.2d 619 (1979).

plaintiff and his superiors.[4] Indeed, the subject matter of the speech in issue here is closely akin to the subject matter found to be protected in Pickering v. Board of Education, supra (allocation of school funds); Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972) (whether a two year college should be elevated to four year status); Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 150 L.Ed.2d 471 (1977) (teacher dress and appearance). In each of those cases, the subject matter of the debate could ultimately affect the plaintiff's conditions of employment. This consideration does not render "protected"

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[4]Plaintiff's claim that he suffered retaliation in the form of unjust pay raises, abolition of the linguistics program, and alteration of other conditions of employment is unrelated to the subject matter of his speech. Thus the District Court's emphasis upon the remedy sought by plaintiff here and in his internal grievance is not apropos.

speech "unprotected" under any fair construction of Connick. Contrary to the district court's conclusions in this case, Connick contains no litmus test prohibiting speech upon matters of public concern which may have some derivative impact upon the speaker's conditions of employment. The District Court erroneously equates matters of internal college affairs with non-public issues. This conclusion is not supported in law since a fundamental tenet of First Amendment jurisprudence is the protection of speech about the". . . manner in which government is operated or should be operated . . ." Mills v. Alabama, 384 U.S. 214, 218, 86 S.Ct. 1434, 16 L.Ed.2d 484 (1966).

In view of these considerations, the Connick majority's narrow statement of its holding is understandable:

> We hold only that when a public employee speaks not as a citizen upon matters of public

> concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate form in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior. [emphasis added]

Finally, and of determinative significance to the resolution of this issue, it is important to note the total absence of disharmony between this plaintiff and his immediate supervisor as a result of his speech.

Here, unlike the facts in Connick, no act or speech of the plaintiff's was considered "an act of insubordination by his superiors" or a "mini-insurrection". On the contrary, his comments regarding academic policy were encouraged as a normal function of teachers within the academic atmosphere in which they were offered. Nor did this plaintiff ever express a lack of

confidence in or question the integrity of his superiors as did the plaintiff in Connick. Indeed, it appears that the District Court misconstrued the essential thrust of Connick's contribution to the Pickering equation through its failure to consider the absence of any adverse impact upon the efficiency of the public services being performed by Georgia State University.

Absent such effect, it is abundantly apparent that plaintiff's speech, judged by its content, form, and context, is protected. See e.g. Patterson v. Johnson, 721 F.2d 228 (8th Cir. 1983).

In sum, plaintiff's speech and conduct concerning academic matters is a function of the academic freedom implicit in the concept of tenure, the purpose of which is to insure freedom

of thought in academic institutions. Before impairing this valuable benefit, the courts should be mindful of the observation of the Supereme Court in Keyishian v. Board of Regents of New York, 385 U.S. 589, 603, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967):

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom, is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." Shelton v. Tucker, supra, 364 U.S. at 487. The classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection." United States v. Associated Press, 52 F.Supp. 362, 372. In Sweezy

v. New Hampshire, 354 U.S. 234, 250, we said:

> "The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."

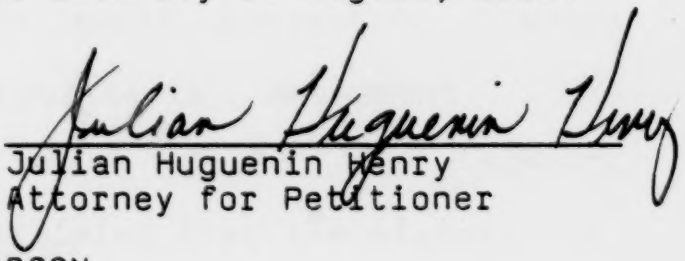
For all of these reasons, it is apparent that the District Court erred in concluding that comment upon internal college matters is beyond the pale of First Amendment protection.

Therefore, the summary affirmance of this judgment by the Eleventh Circuit Court of Appeals should be reversed and the case should be remanded with appropriate directions.

CERTIFICATE OF SERVICE

I certify that I have this date served the Respondents with the foregoing Petition for Certiorari by placing three (3) printed copies thereof in the United States mail with proper first class postage affixed thereto and addressed to their attorney, Alfred L. Evans, Jr., Senior Assistant Attorney General, State of Georgia, 132 State Judicial Building, Atlanta, Georgia 30334.

This 14th day of August, 1984.



Julian Huguenin Henry
Attorney for Petitioner

HENRY & PEARSON
P. O. Box 808
Athens, Georgia 30603
(404)546-1395

APPENDIX

1. Opinion of Uniteid States District Court for the Northern District of Georgia.
2. Judgment of United States Court of Appeals for the Eleventh Circuit.

IN THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT
OF GEORGIA
ATLANTA DIVISION

W. L. BALLARD, :

Plaintiff, : CIVIL ACTION

vs. : No. C81-2238 A

PAUL BLONT, et al., :

Defendants. :

O R D E R

In this 42 U.S.C. § 1983 action, the plaintiff, a tenured professor at Georgia State University, alleges that he was retaliated against for conduct protected by the First and Fourteenth Amendments. In addition, he alleges that he was not awarded salary increases to which he was entitled and that this action violated the due process and equal protection clauses of the Fourteenth Amendment. The defendants have moved for summary judgment, claiming that the plaintiff's alleged speech was not protected because it did not relate to matters

of "public concern" and that their pay raise system did not violated the plaintiff's due process and equal protection rights.

I. BACKGROUND

The plaintiff, Dr. William Lewis Ballard, was hired as an assistant professor of English at Georgia State University in 1969, and shortly thereafter he began developing a linguistics program in the English department. In 1973 he was promoted to associate professor of English and was awarded tenure. He continued teaching only linguistics courses until 1979. From the inception of the linguistics program in 1969 until its ultimate dissolution in 1980, it is uncontroverted that the linguistics program was plagued by consistently low student interest. The defendants contend that the lack of student interest was the motivating factor in

the decision to dissolve the program.

Shortly before the dissolution of the linguistics program, but at the time when enrollment in the linguistics courses was extremely low, defendant Dr. Blount, Chairman of the English department and Dr. Ballard's immediate supervisor, informed Dr. Ballard that he (Dr. Ballard) would have to teach traditional English courses rather than the linguistics courses which he had previously taught. Dr. Ballard chose teaching a freshman-level English class, and he began teaching this class in the fall of 1979. He continued teaching in the English department until September 1981, at which time he was transferred to the College of Public and Urban Affairs. Shortly thereafter, in December 1981, Dr. Ballard instituted this suit.

In his complaint Dr. Ballard alleges that he has received less than the average annual salary increases

for the academic years 1976-77 through 1981-82. He claims that these less-than-average salary increases were retaliatory actions designed to punish him for the exercise of rights secured by the First and Fourteenth Amendments. Dr. Ballard also claims that the defendants retaliated against him in a variety of other ways, including: cancelling the entire linguistics program, failing to appoint him to faculty committees, denying him equal release time (pay without duties), and failing to assign him to appropriate summer teaching duties[1].

After reviewing Dr. Ballard's complaint and deposition, this Court

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[1] These last three claims are dubious, since Dr. Ballard conceded in his deposition that he never sought to be appointed to any faculty committee, that he did receive release time, and that he never objected to the summer teaching duties to which he was assigned. Ballard Deposition at 9, 42-45.

has identified four separate communicative and associative activities for which Dr. Ballard claims he was retaliated against. These claims may be summarized as follows:

> (1) A letter he wrote objecting to the joint decision of Dr. Blount and the Department Tenure Committee which recommended denying tenure to a colleague of Dr. Ballard. Ballard Deposition at 27.
>
> (2) Dr. Ballard's challenges to the manner in which he and other colleagues were assigned to teach freshman-level English courses. Ballard Deposition at 19.
>
> (3) Dr. Ballard's claim that he was further retaliated against when he unsuccessfully challenged through an internal administrative grievance procedure the defendants' decision to award him less-than-average annual salary increases. Complaint ¶ 25.
>
> (4) Dr. Ballard's challenges to a proposed freshman English syllabus which restricted a teacher's latitude in conducting the class. Ballard Deposition at 18.

In addition to claiming that his less-than-average salary increases were in retaliation for protected First Amendment activity, Dr. Ballard claims that these salary increases denied him equal protection and due process. Complaint ¶¶ 23, 24.

II. DISCUSSION

Summary judgment is appropriate when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party seeking summary judgment bears an exacting burden of establishing that there is no dispute regarding any material fact in the case. Warrior Tombigbee Transportation Co. v. M/V Nan Fung, 695 F.2d 1294, 1296 (11th Cir. 1983). And all reasonable doubts about the facts should be resolved in favor of the non-movant. Clemmons v. Doughterty County, Georgia, 684 F.2d 1365, 1369 (11th Cir. 1982).

A. The First Amendment Claim

The threshold inquiry in this case is whether Dr. Ballard's speech involved matters of "public concern," rather than matters relating merely to Dr. Ballard's personal interest. Speech involving the former is protected, whereas speech involving the latter is not. Connick v. Meyers, ___ U.S. ____, ____, 103 S. Ct. 1684, 1690 (1983). If the employee's speech cannot be characterized fairly as constituting speech on a matter of public concern, it is unnecessary for the court to scrutinize the reasons for the employee's alleged reprimand. Id. at 1689. Whether Dr. Ballard's speech involved a matter of public concern is to be determined by the content, form, and context of a given statement as revealed by the whole record. Id. at 1690. Additionally, the question relating to the protected

status of speech is one of law; thus it is an appropriate issue to be resolved on a motion for summary judgment. Id.; Mahaffey v. Kansas Board of Regents, 562 F. Supp. 887, 888, 890 (D. Kan. 1983).

In Connick v. Myers, the Supreme Court interpreted Pickering v. Board of Education, 391 U.S. 563, 88 S. Ct. 1731 (1968), and its progeny and attempted to strike a balance between the interest of the employee, as a citizen, in commenting on matters of public concern, and the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees. The specific question framed by the Connick Court was "whether the First and Fourteenth Amendments prevent the discharge of a state employee for circulating a questionnaire concerning internal office affairs." 103 S. Ct. at 1686 (emphasis added). The state

argued that since the employee's questionnaire concerned matters relating only to internal office affairs, this speech ws not protected because, by definition, it did not relate to a matter of public concern. The Court agreed, reasoning that employee expression which does not relate to any matter of political, social, or other community concern is a personal, rather than a public, expression. Id. at 1680. Additionally, the Court recognized that

> government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment. Perhaps the government employer's dismissal of the worker may not be fair, but ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not subject to judicial review even if the reasons for dismissal are alleged to be mistaken or unreasonable.

Id

The Connick Court's public versus private distinction reflects the common-sense realization that government offices could not function if every employment decision became a constitutional matter. The Court rejected the proposition that all matters which transpire within a government office are of public concern, since this would mean that every remark or criticism directed against a public official would plant the seed of a consitutional case. Id. at 1691. Indeed, if a faculty member need only point to some verbal criticism or altercation concerning his college, its curriculum, or how things are run in order to convert an adverse personnel decision into a federal action, then nearly every adverse personnel decision could be reviewable by a federal court under 42 U.S.C. § 1983.

The Court also noted that "the First Amendment does not require a public office to be run as a round-table for employee complaints over internal office affairs." Id. at 1691 (emphasis added). Finally, the Court recognized that even in those situations where the employee's speech has a limited impact on matters of public concern, it will not necessarily fall within the protection of the First and Fourteenth Amendments. Id. at 1693-94. In sum, the Court held

> [W]hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

Id. at 1690.

The Connick decision was applied in a case remarkably similar to this

case. In Mahaffy v. Kansas Board of Regents, 562 F. Supp. 887 (D. Kan. 1983), a tenured professor claimed that he was punished for expressing opinions protected by the First and Fourteenth Amendments. The plaintiff's assertedly protected speech activities concerned matters such as his individual salary increases, his position on the college organizationalchart, policy decisions concerning internal departmental affairs, and the identity of his superiors. The Court characterized the discussion of these matters as quintessential items of individual, rather than public, concern. Further, the Court noted that "the Connick [C]ourt made it plain that an individual cannot bootstrap his individual grievance into a matter of public concern either by bruiting his complaint to the world or by invoking a supposed popular interest in the way

public institutions are run." Id. at 890. Accordingly, the Court rejected the plaintiff's claim that this speech was protected by the First and Fourteenth Amendments. See also Leonard v. City of Columbus, 705 F.2d 1299, 1305 (11th Cir. 1983) (interpreting Connick as providing less protection to complaints concerning purely internal office affairs than to those concerning matters of "public concern").

In applying the Connick test to Dr. Ballard's assertedly protected First Amendment activity, see supra p. 3, this Court finds that Dr. Ballard's speech did not relate to matters of public concern and thus was unprotected. For example, the subject matter of Dr. Ballard's grivance which he pursued through the university's grievance procedure concerned his salary increases. An individual's

salary is an issue personal to the individual and has no relationship to matters of public concern. Similarly, Dr. Ballard's challenges to the manner in which he and his colleagues were assigned to teach the freshman English courses was a matter of private concern. The particular courses an individual is assigned to teach simply cannot be viewed as a matter in which the public has a legitimate interest. Accordingly, expression relating to this challenge simply does not rise to a matter of public concern.

The remaining two speech activities for which Dr. Ballard claims he was retaliated against also did not involve matters of public concern. Dr. Ballard's deposition makes it unmistakably clear that these challenges involve matters relating to internal college affairs rather than to matters of political or social import--matters

of public concern.[2]

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[2] In pertinent part Dr. Ballard's Depostion reads as follows:

Q: What [allegedly protected] criticisms did you make that you feel are a basis of this action?

A. There were two or three that stand out in my mind that are particularly significant, but there were a number of minor ones all along. Some of the major ones had to do with the development over a period of years with regards to the freshman English syllabus adoption, new syllabus adoption, and there were the events that had to do with the letter I wrote to Dr. Blount on Tina Sizemore's decision or decision about Tina Sizemore.

Then there was a specific time when I -- again, a sequence of events, but a particular event when I talked to the advisory council about the policies of how teachers were assigned in the freshman program, who taught it and under what conditions and so forth.

As I say, there were a number of things, all complex in themselves, and there were other actions as well, other times as well.

Q. Basically, could you summarize and say that these are all to your perception constructive criticism of department policies in the functioning of the English department?

The first speech activity concerned a proposed freshman English syllabus. In defendant Dr. Blount's deposition he recalled that during the faculty discussion of the proposed syllabus two general challenges were raised regarding this issue, and Dr. Ballard was one of several faculty members discussing these challenges. Blount Deposition at 15-19, 29.[3] The first challenge concerned the prescriptive nature of the syllabus; the syllabus opponents claimed that the syllabus was too rigid and that it removed the flexibility with which the teachers

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A. Yes.
Q. As opposed to positions on matters of public or political issues or things of that sort?
A. Yes.
Ballard Deposition at 19-20.

[3] Dr. Blount's statements relating to the proposed English syllabus have neither been challenged nor contradicted by the plaintiff and therefore will be accepted as true.

were accustomed to. Id. at 15. The second challenge concerned the procedures employed to review and approve the proposed syllabus. Apparently, one committee entrusted with the duty of initially reviewing such proposals had not been consulted. In any event, both of these challenges were addressed and resolved; the syllabus was eventually adopted, but only after it had gone through the correct administrative procedures and after the prescriptive tone of the syllabus was modified.

The plaintiff claims that this speech was related to a matter of public concern, since the decision regarding the syllabus would have an eventual, derivative effect on the freshman English students. Taken to its logical conclusion, the plaintiff's argument means that any time a person's speech will have an effect on the

public, regardless of how small or unlikely that effect may be, that speech relates to a matter of public concern. This was a specific concern of the Connick Court, and the Court wisely rejected this identical argument. Accordingly, this Court concludes that any speech relating to the discussion of the syllabus concerned matters of internal college affairs and did not relate to matters of public concern.

The final speech activity for which Dr. Ballard claims he was retaliated against concerned his objection to the administrative decision to deny tenure to a colleague, Tina Sizemore. For the reasons stated above, this Court concludes that absent unusual circumstances an administrative decision to grant or deny tenure to an individual is not a matter of public concern, and an individual challenging

this administrative decision is without First Amendment protection.

In sum, the Court concludes that the speeck for which Dr. Ballard alleges he was retaliated against for expressing, simply did not relate to matters of public concern and therefore is not protected.

B. The Due Process and Equal Protection Claims

In his remaining constitutional claims, Dr. Ballard asserts that the defendants' decision to award him less than the average annual salary increases violated his due process and equal protection rights. In Parratt v. Taylor, 451 U.S. 527, 101 S. Ct. 1908 (1981), the Supreme Court identified four prerequisites necessary to assert a violation of the due process clause. These prerequisites include

> (1) The conduct complained of must have been committed by a person acting under

color of state law;

(2) There must be a constitutionally protected property or liberty interest at issue;

(3) There must have been a deprivation of this protected interest; and

(4) The deprivation of this interest must have occurred without due process of law.

Id. at 535-37, 101 S. Ct. at 1913-14. Although it is undisputed that the first requirement is satisfied here, the Court finds that the remaining three requirements are not satisfied. In Doyle v. University of Alabama in Birmingham, 680, F.2d 1323 (11th Cir. 1982), the Eleventh Circuit rejected the argument that a university professor had a protected property or liberty interest in a merely recommended salary raise. The plaintiff's proposed salary increase was subsequently disapproved because of her perceived unsatisfactory

teaching performance. This Court finds that these expectations were not protected property or liberty interests for due process purposes.

In addition to failing to meet the second and third requirements of Parratt, Dr. Ballard also fails to meetthe final Parratt requirement--a showing that he was not afforded due process in connection with the decision to award him his less-than-average salary increases. Due process merely requires an opportunity for a hearing appropriate to the nature of the case, Muline v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313, 70 S. Ct. 652, 656-57 (1950), granted at a meaningful time and in a meaningful manner. Armstrong v. Manzo, 380 U.S. 545, 552, 85 S. Ct. 1187, 1191 (1965). See also Clark v. Whiting, 607 F.2d 634, 655-45 (4th Cir. 1979) (the amount of due process required in a case where a

teacher alleges he was denied a promotion is far less than that necessary in a trial-type situation). Dr. Ballard appealed his salary grievance both within the English department and to a college-level grievance committee. At these hearings, Dr. Ballard appeared with counsel, was afforded the right to give testimony and present evidence, and was entitled to a determination based on the record. This Court finds Doyle dispositive of the second and third Parratt requirements. The merit salary increases at issue in this case were by definition discretionary, designed to serve as a reward for an acceptable teaching performance. There merit salary increases were, at best, expectations rather than entitlements, and this court finds that these hearings, and the procedural and substantive rights afforded herein, adequately afforded

Dr. Ballard his due process rights.[4] Clinging to the last straw, Dr. Ballard asserts that his less-than-average annual salary increases violated the Equal Protection Clause of the Fourteenth Amendment. In order to establish a violation of the Equal Protection Clause based upon the ad hoc action of state officials, a plaintiff must demonstrate that the action was prompted by some racial, or other class-based, invidiously discriminatory

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[4] Despite these procedural and substantive safeguards, Dr. Ballard was unsuccessful at both appellate levels. The appellate committees found numerous reasons supporting Dr. Ballard's limited salary increase, including the high attrition rate in Dr. Ballard's English courses, Dr. Ballard's incomplete and nonconstructive grading of student papers, and the numerous student complaints relating to Dr. Ballard's teaching performance. In sum, these appellate committees found defendant Dr. Blount's conclusion that Dr. Ballard was performing inadequately and did not deserve the salary increase to be reasonable.

animus. Griffin v. Breckenridge, 403 U.S. 88, 91 S. Ct. 1790 (1971). See also Mahaffey v. Kansas Board of Regents, 562 F. Supp. 887, 890. It is this burden that Dr. Ballard fails to satisfy. At the outset, the Court notes that Dr. Ballard does not allege that any other member of the English department faculty is similarly situated for equal protection purposes. Nor does he assert that he is a member of any traditional discrete class (e.g., race, sex, or age) that either was or may be subjected to invidious discrimination. Rather, he attempts to squeeze himself into a puntative class of all faculty membmers working under the merit pay raise system. This attempted classification does violence to the dictate of Griffin, since a relaxed classification would result in the very generalized federal tort law that the Supreme Court sought

to avoid in Griffin. See 403 U.S. at 102, 91 S. Ct. at 1798. Accordingly, this Court refuses to permit Dr. Ballard to prosecute his individualized grievance in the guise of the Equal Protection clause. Additionally, this Court finds that the merit pay system is constitutionally permissible, since it is substantially related to a legitimate and important objective of the university. See Stone v. Board of Regents of the University System of Georgia, 620 F. 2d 526, 529 n.8 (5th Cir. 1980).

III. SUMMARY

In summary, the Court **GRANTS** the defendants' motion for summary judgment.

SO ORDERED, this 12th day of December, 1983.

ROBERT L. VINING, JR.
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 84-8041
Non-Argument Calendar

W. L. BALLARD,

Plaintiff-Appellant,

versus

PAUL BLOUNT, et al.,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE NORTHERN
DISTRICT OF GEORGIA

(May 22, 1984)

Before FAY, VANCE and KRAVITCH,
Circuit Judges

PER CURIAM:

AFFIRMED on the basis of the order of the Honorable Robert L. Vining, Jr., United States District Judge, December 12, 1983.

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FILED
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ALEXANDER STEVAS
CLERK

(2)

NO. 84-348

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

W. L. BALLARD,

Petitioner,

v.

PAUL BLOUNT, etc., et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

MICHAEL J. BOWERS
Attorney General

JAMES P. GOOGE, JR.
Executive Assistant
Attorney General

H. PERRY MICHAEL
First Assistant
Attorney General

PLEASE ADDRESS ALL COMMUNICATIONS TO:

ALFRED L. EVANS, JR.
Senior Assistant
Attorney General
132 State Judicial Building
Atlanta, Georgia 30334
Telephone: 404-656-3389

JIM O. LLEWELLYN
Senior Assistant
Attorney General

ALFRED L. EVANS, JR.
Senior Assistant
Attorney General

33pp

QUESTIONS PRESENTED

1. Is a college professor's criticism of the internal operating policies and affairs of his academic department (specifically, course content, teaching assignments and views on departmental needs for the teaching of freshman composition) "protected" speech under the First Amendment for purposes of securing federal judicial review of whether or not his merit pay raises were large enough?

2. Assuming *arguendo* that this Court were for any reason to: (1) view the instant case as not being controlled in Respondents' favor by *Connick v. Myers*, or (2) be disposed to overrule *Connick*, is the judgment below nonetheless correct and properly affirmable on the record based upon the following alternative grounds:

(a) Do facts of record demonstrate that even were the speech to be viewed as "protected", Respondents would still be entitled to judgment under each of the two tests enunciated by this Court in *Mt. Healthy*?

(b) Do facts of record demonstrate an absence of federal jurisdiction under the "case or controversy" limitations of Article III of our Constitution for want of any judicially ascertainable *injury in fact* to Petitioner.

(c) Does the fact that a faculty grievance committee considered and rejected Petitioner's pay raise claims, concluding that there had been no showing that his less than hoped for salary increases had been unfairly discriminatory or based upon anything other than his academic performance, render relitigation of these controlling evidentiary conclusions of the grievance com-

mittee inappropriate under *Board of Education of Rogers, Arkansas v. McCluskey*?

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS

The parties to the proceeding in the Court of Appeals are correctly identified in the caption of Petitioner's Petition for a Writ of Certiorari.

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1. The district court's decision in this case was arrived at through precisely that analysis of the content, form and context of Petitioner's "speech" which this Court called for in *Connick v. Myers*, 461 U.S. 138 (1983). Its conclusion that Petitioner's comments about the internal operating policies and academic affairs of his College and Department did not constitute "protected speech" for purposes of constitutionalizing and involving the federal judiciary in the size of Petitioner's pay raises was not only authorized, but was indeed compelled by *Connick*	11
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2. Even were the Court disposed to overrule or limit its decision in *Connick*, or, were it for any other reason to conclude that *Connick* was not controlling as to Dr. Ballard's case, the petition for certiorari should be denied in that the judgment of the district court, affirmed by the Court of Appeals, was in fact correct and affirmable on each of three alternative grounds.. 18

   (a) Facts of record show that should *Connick* be disregarded and Petitioner's speech held to be protected, the judgment below would still be correct and affirmable under *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977).... 19

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OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Georgia is reported as *Ballard v. Blount*, 581 F.Supp. 160 (N.D.Ga. 1983). On appeal the United States Court of Appeals for the Eleventh Circuit placed the case on its "Non-Argument Calendar" under Fed. R. App. P. 34(a) and 11th Cir. R. 23, and affirmed without opinion. *See Ballard v. Blount*, 734 F.2d 1480 (11th Cir. 1984).

JURISDICTION

The jurisdictional basis of Petitioner's application for review by this Honorable Court is correctly set forth in his Petition for a Writ of Certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

While Respondents agree as to the involvement of the First Amendment and 42 U.S.C. § 1983, both of which are accurately set forth at p. iv of the Petition for Certiorari, it is Respondents' view that since the First Amendment has no application to the States or State officials other than through Section 1 of the Fourteenth Amendment, this section of the Fourteenth Amendment is also pertinent. It provides:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The facts of record in this case are considerably more involved than would appear from Petitioner's "Statement of the Case". While Respondents do not take exception to the general accuracy of what Petitioner says, it is their view that a somewhat more comprehensive statement would be helpful to the Court in its consideration of whether or not the decision below is "cert-worthy".

(1) Nature of the Case and Proceedings Below.

This action is essentially an attack by a college professor of the English Department at Georgia State University (a member institution of the University System of Georgia) upon the size of certain of his annual merit salary increases, it being Petitioner's contention that his pay raises haven't been as large as they should have been. R. 5, 8-9, 134.[1] Following an adverse adjudication by a faculty grievance committee in the Spring of 1981 (R. 225-230), the professor, Dr. W. L. Ballard, filed the instant action in the United States District Court for the Northern District of Georgia on December 11, 1981. Dr. Ballard alleged that he had received "less than average salary increments for academic years 1976-77, 1977-78, 1978-79, 1980-81, and 1981-82" (R. 5), and sought federal

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[1] The Complaint also alleged various lesser grievances as a contended denial of "committee assignments", denial of "summer teaching opportunities", denial of "released time", and the curtailment of course offerings in the area of Petitioner's specialty, namely "linguistics". R. 6. These contentions were not pressed, however, following undisputed evidence (including Petitioner's own admissions) that he had in fact served on committees and had summer teaching assignments, with the curtailment of course offerings in linguistics following long-term lack of student interest and enrollment. R. 213-218. The district court referred to the dubious nature of these claims in view of Petitioner's admissions. 581 F.Supp. at 161n.1.

judicial relief under 42 U.S.C. § 1983 in order to redress asserted deprivations of rights secured to him by the First and Fourteenth Amendments to the United States Constitution. R. 3. Named as defendants were Dr. Paul Blount, Head of the English Department at Georgia State University, Dr. Clyde Faulkner, Dean of the University's College of Arts and Sciences, and the College's former dean, Dr. Glenn G. Thomas. R. 3-4. In addition to alleging the violation of rights secured to him under the First Amendment, Dr. Ballard asserted violations of his rights under the "due process" and "equal protection" clauses of the Fourteenth Amendment. R. 8.

Following extensive discovery, including the depositions of all parties, the defendants (now Respondents) Blount, Faulkner and Thomas moved for summary judgment. R. 142-143. On December 12, 1983, the District Court entered an order and final judgment granting the motion for summary judgment and dismissing Petitioner's action. R. 347-361; *see Ballard v. Blount*, 581 F.Supp. 160 (N.D.Ga. 1983). On appeal, the United States Court of Appeals for the Eleventh Circuit placed the case on its "Non-Argument Calendar" under Fed. R. App. P. 34(a) and 11th Cir. R. 23 and affirmed without opinion. *See Ballard v. Blount*, 734 F.2d 1480 (11th Cir. 1984). Petitioner Ballard has filed a timely petition for a writ of certiorari under 28 U.S.C. § 1254.

(2) **Statement of Facts.**

The underlying facts of this case are substantially undisputed. Dr. Ballard, Plaintiff-Appellant below and now Petitioner, has been a member of the faculty at Georgia State University since 1969. Dep. Ballard, p. 6. His initial appointment was in the English Department of the Col-

lege of Arts and Sciences at the rank of Assistant Professor of English. Dr. Ballard's Ph.D. is in "linguistics" (a discipline which deals with the analysis of language, *e.g.*, development of sound and grammar systems in differing places). Dep. Ballard, pp. 4-5. The purpose of his employment was to help develop a linguistics program at Georgia State University—particularly as a discipline or area of concentration at the higher or graduate level. Dep. Ballard, pp. 6-7; Dep. Blount, p. 6; Dep. Thomas, pp. 51-52. Dr. Ballard was (and is) viewed by his administrative superiors, including Respondents, as a good teacher in the area of linguistics. Dep. Blount, p. 96; Dep. Thomas, pp. 23, 51. Accordingly, his performance as a teacher in this area was rewarded not only by periodic salary increases, but by promotion to the rank of Associate Professor of English and the award of "tenure" in 1973. Dep. Ballard, p. 6; Dep. Blount, pp. 7-8.

The underlying problem which ultimately led to the instant legal action was the relative lack of student interest and enrollment in linguistics. Former Dean Thomas testified that he became concerned about the enrollment problem in linguistics shortly after becoming Dean in 1973, the problem as he saw it being whether the College of Arts and Sciences and Georgia State University could continue to finance a program which had very limited student enrollment and showed no signs of growing. Dep. Thomas, pp. 21-22.

For a number of years thereafter, linguistics received "favored treatment" in the sense that many classes were taught rather than cancelled notwithstanding student enrollment lower than the minimum number ordinarily required for a class to proceed. Dep. Blount, pp. 94-95. This was done in an attempt (unsuccessful as it later

turned out) to build up the linguistics program by giving it as much support as possible. Dep. Blount, p. 95. Petitioner Ballard freely acknowledged the existence of enrollment problems in linguistics, although his perceptions differed from those of his administrative superiors (*i.e.*, Respondents) as to the severity of the problem. Dep. Ballard, p. 7.

Ultimately, in March, 1980, Dean Thomas made the decision to cancel the linguistics "program" (the term "program" has reference to linguistics as an area of concentration, particularly at the graduate level, not to be equated with an elimination of *all* course offerings in linguistics at Georgia State University). Dep. Thomas, pp. 27, 38-39; Dep. Ballard, pp. 14-15. Dean Thomas testified that the decision represented his professional judgment that in view of continued low enrollment and the fact that the linguistics program over a ten year period simply hadn't gotten off the ground, this was the appropriate resolution of the problem. Dep. Thomas, pp. 28, 38-40, 51. At the time (March, 1980), Dr. Ballard actually applauded the decision he now criticizes. He wrote Dean Thomas saying that the edict, while "stunning" for a time (even though not completely unanticipated), was "strikingly bold and innovative", clearing the air within the English Department "of concern that linguistics would in any way damage the Department's programs", and that he (Dr. Ballard) saw no punitive impact of the decision upon himself. *See* Exhibit "A" to Dep. of Ballard; *also* R. 23.

Even prior to the termination of the linguistics program, Dr. Blount, as Chairman of the Department of English, had advised Dr. Ballard that because of low student enrollment, he (Dr. Ballard) would have to do

more teaching in the area of English proper, giving Dr. Ballard a choice of courses from which to make a selection. Dep. Blount, p. 81; Dep. Ballard, pp. 9-10. Dr. Ballard chose English 112, a *freshman* course in English Composition. Dep. Ballard, pp. 9-10.

In contrast to Dr. Ballard's acknowledged effectiveness as a teacher of linguistics, his teaching efforts in freshman English Composition led to a larger than usual number of student complaints. Former Dean Thomas testified that while he did not recall any student complaints at all about Dr. Ballard's teaching in linguistics, complaints were frequent in connection with his English 112 classes. Dep. Thomas, p. 23. After Dean Thomas left and Dr. Faulkner was appointed initially "Acting Dean" (July, 1980), and then "Dean" (June, 1981), Dr. Faulkner similarly received student complaints relating to Dr. Ballard's English 112 classes. Dep. Faulkner, pp. 21-26. In Dean Faulkner's experience the proportion of complaining students was high. Dep. Faulkner, pp. 22-24.

Dr. Ballard's immediate administrative supervisor, Department of English Chairman Blount, experienced the same sort of student complaints and was also of the opinion that the number of student withdrawals from Dr. Ballard's freshman English Composition classes (English 112) was excessive, all of which tended to be reflected in Dr. Blount's performance evaluations of Dr. Ballard for merit salary increase purposes. *See* Dep. Blount, pp. 80-96; Exhibit "A" to Dep. of Dean Faulkner. Petitioner Ballard conceded that he was more qualified to teach linguistics than he was to teach English Composition—a course (*i.e.*, English 112) which he said he had been teaching more frequently since 1979. Dep. Ballard, pp. 7, 9.

Petitioner Ballard's percentage salary increases over

academic years 1977-78 through 1981-82 were somewhat less than the hypothetical "average" merit salary increases which could be calculated based upon the total funds made available by the Board of Regents for faculty salary increases and the total number of employed faculty members (virtually all of whom in fact received individual percentage increases either greater or smaller than the hypothetical "average"). Dr. Ballard's percentage increases in salary were, on the other hand, only marginally less than the hypothetical "averages" during the years in question. Thus at the end of the time period involved, academic year 1981-82, six of the eleven Associate Professors in the Department of English had higher salaries than Dr. Ballard, but four still had lower salaries than he did. *See* Exhibit "D" to Affidavit of Dr. Paul G. Blount; R. 221. In a total salary range for Associate Professors in the Department from $23,000 to $28,000, Dr. Ballard's salary of $24,500 during academic year 1981-1982 was in fact only $100 less *per year* than the salary of the "median" Associate Professor. *Ibid.*

Dr. Ballard first sought internal administrative relief. A faculty appeal committee was appointed to hear, and did hear, his salary grievance. The Committee found, *inter alia:* (1) that the attrition rate in Dr. Ballard's English 112 courses (freshman composition) was excessive, and (2) that Dr. Blount had based his estimate of Dr. Ballard's "merit" on what he (Dr. Blount) perceived to be Dr. Ballard's relatively poor performance in the teaching of English 112. The Committee concluded that there was no proof that Dr. Blount had been arbitrary, capricious, or unfairly discriminatory in his 1970-1980 recommendations respecting Dr. Ballard's salary increases, and recommended that Dr. Ballard's request for

larger pay raises than he had received, be denied. R. 227-230.

Aggrieved by this adverse judgment of the "Faculty Appeal Committee", Dr. Ballard initiated his legal action in the United States District Court. With respect to his First Amendment contentions (Dr. Ballard has not appealed the district court's adverse adjudications respecting his "due process" and "equal protection" claims), Dr. Ballard's Complaint described the nature of the "speech" involved as follows:

> "On many occasions since the Spring of 1976, Plaintiff has engaged in communicative and associative activity which is protected by the First Amendment to the United States Constitution. Specifically, Plaintiff has throughout this time period offered fair criticism and constructive suggestions regarding policy and academic matters within the Department of English, Georgia State University, and the College of Arts and Sciences, Georgia State University." R. 5.

This conceded focus of Dr. Ballard's "speech" on the internal academic affairs and operations of Georgia State University's Department of English (*e.g.*, how the Department was being run) is accurately described at pp. 2-6 of his Petition for a Writ of Certiorari and will be further discussed in the Argument portion of this Brief. As we shall see, "speech" of this nature cannot reasonably be viewed as being "protected" for purposes of constitutionalizing and obtaining federal judicial review of the size of Dr. Ballard's pay raises—to determine, for example, whether his 9.4% increase rather than 11.0% for academic year 1981-82 has somehow managed to violate the United States Constitution.

SUMMARY OF ARGUMENT

The notion that a college professor can "constitutionalize" and obtain federal judicial review of the size of his merit pay raise by the simple strategem of attributing any perceived inadequacy to the fact that he has spoken out in criticism of the internal academic policies or affairs of his college or department (here course content, teaching assignments, and departmental personnel needs for the teaching of freshman English Composition) is untenable under this Court's decision in *Connick v. Myers*, 461 U.S. 138 (1983). The district court's decision in this case was arrived at through precisely that analysis of the *content, form* and *context* of the speech called for in *Connick*. Its summary affirmance by the United States Court of Appeals for the Eleventh Circuit, was plainly correct and does not give rise to a conflict between the circuits as Petitioner mistakenly suggests. The petition for certiorari wholly fails to present any important federal issue which could reasonably be said to have survived *Connick* and merit plenary review of the size of Petitioner's merit salary increases by the Supreme Court of the United States.

Moreover, even if this Court had never decided *Connick*, or, were it for any reason to conclude that *Connick* should be reversed, limited or otherwise held inapplicable to Petitioner's situation, this Petition for certiorari should nonetheless be denied for each of three alternative reasons.

The first additional reason for denying the writ is that the decision below is also correct and properly affirmable under each of the two tests enunciated by this Court in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). As to the first test, the record

demonstrates that Petitioner failed to bear *plaintiff's* burden of showing that his speech was a motivating factor respecting the adverse personnel decisions. However, even had Petitioner passed this initial test, the record further shows that *Respondents* tendered evidence to establish the defense that the attacked personnel decisions would have been precisely the same had Petitioner done naught but praise how the English Department was being operated, and Petitioner failed to counter this evidence with any *evidence* (as opposed to naked charges) to the contrary.

Another non-*Connick* reason for denying the petition for certiorari is the absence of any actual injury in fact to Petitioner as a result of his speech. Under a merit approach to professorial salary increases there manifestly can be no legal entitlement to, or vested *property* interest in, a bigger pay raise. The record also negates the existence of any prior restraint or actual prevention of speech by Petitioner which might arguably be viewed as an infringement upon a legally cognizable *liberty* interest. This absence of any judicially ascertainable *injury in fact* suggests the appropriateness of a denial of certiorari for want of federal jurisdiction under the "case of controversy" limitations of Article III of our Constitution. *Warth v. Seldin*, 422 U.S. 490, 499 (1975); *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 218-219 (1974). The jurisdictional limitations of Article III apply to First Amendment claims. *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972).

Finally, Petitioner's grievances about the size of his salary increases were presented to and rejected by a faculty grievance committee. The faculty committee concluded that Petitioner's somewhat less than average salary in-

creases had been based upon his department chairman's perception of Petitioner's somewhat less than average performance in teaching freshman English Composition, and hadn't been unfairly discriminatory. Relitigation of these controlling conclusions of the faculty grievance committee in a United States district court would have been inappropriate under this Court's decision in *Board of Education of Rogers, Arkansas v. McCluskey*, 458 U.S. 966, 969 (1982). For this reason too the result reached by the courts below was correct and affirmable, with a grant of certiorari and plenary review by this Honorable Court unwarranted.

ARGUMENT

1. **The district court's decision in this case was arrived at through precisely that analysis of the content, form and context of Petitioner's "speech" which this Court called for in *Connick v. Myers*, 461 U.S. 138 (1983). Its conclusion that Petitioner's comments about the internal operating policies and academic affairs of his College and Department did not constitute "protected speech" for purposes of constitutionalizing and involving the federal judiciary in the size of Petitioner's pay raises was not only authorized, but was indeed compelled by *Connick*.**

   (a) **The decision below is plainly correct.**

Do we really want to trivialize the First Amendment to the point where federal courts are sitting as employee grievance committees, evaluating relative office size, thickness of carpeting, time at the water cooler, or, as here, whether a merit pay raise should have been 9.5% rather than 8.0% for academic year 1977-78? It would be difficult to find any living, breathing professor, on any college campus, who has not criticized the sort of internal college or departmental academic policies or affairs

pointed to by Petitioner in this case (*i.e.*, curricular or course content, teaching assignments, and departmental personnel needs). We think the district court did naught but recognize the plain facts of academic life when it said:

> "Indeed, if a faculty member need only point to some verbal criticism or altercation concerning his college, its curriculum, or how things are run in order to convert an adverse personnel decision into a federal action, then nearly every adverse personnel decision could be reviewable by a federal court under 42 U.S.C. § 1983." *Ballard v. Blount*, 581 F.Supp. 160, 163 (N.D.Ga. 1983).

We would indeed suggest that the only way in which this entirely accurate observation could be rendered even more accurate in the context of campus life in the real world would be through deletion of the word "nearly".

In *Connick v. Myers*, 461 U.S. 138, 143 (1983), this Court recognized that there must be a:

> "common-sense realization that government offices could not function if every employment decision became a constitutional matter."

The Court has long been cognizant of the danger of overly broad First Amendment construction swallowing the general rule that:

> "The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by [governmental] agencies." *Bishop v. Wood*, 426 U.S. 341, 349-350 (1976) [bracketed word "governmental" substituted for "federal"].

In *Pickering v. Board of Education*, 391 U.S. 563 (1968), for example, the Court held that even where the speech in issue clearly is *protected* speech under the First Amend-

ment, the rights of a governmental employee, unlike those of a private citizen, must be balanced against countervailing interests of the governmental employer, such as the possibly harmful impact of the *protected* speech upon the degree of harmony necessary to efficient agency operations or maintenance of discipline by administrative superiors. The factual setting of *Pickering* was one where the governmental employee's speech involved a local political controversy reported in the media and hence clearly was "protected".

Pickering did not, of course, reach the precise question presented to the Court in *Connick*, which is when and what speech is deemed to be "protected" for purposes of requiring the "balancing" of *Pickering*. On the other hand the *Pickering* Court did repeatedly refer to the teacher's right in terms of a right to speak out *as a citizen on matters of public concern*. *See, e.g.*, 391 U.S. at pp. 568, 570.

Thus when it came to defining what sort of criticism by a college or university faculty member would constitute speech which is "protected" and hence require the "balancing" of *Pickering*, a number of courts, even prior to *Connick*, held that those "dime a dozen" campus verbal disagreements over departmental policy, course content and like academic matters, did not involve speech about "matters of public concern", and hence were not "protected" for purposes of constitutionalizing and obtaining federal judicial review of, campus personnel decisions. In *Clark v. Holmes*, 474 F.2d 928, 931 (7th Cir. 1972), *cert. denied*, 411 U.S. 972 (1973), the Seventh Circuit rejected a faculty member's First Amendment contentions by saying:

> "His disputes with his superiors and colleagues about course content and counseling were not 'matters of public concern' and involved Clark as a teacher rather than as an interested citizen."

Similarly, in *Rowe v. Forrester*, 368 F.Supp. 1355, 1357 (M.D.Ala. 1974), it was said of such commonplace campus disagreements that:

> "This dispute did not involve Mr. Rowe's statements on matters of public concern ***, but rather resulted from disagreements about the regular operations and functions of the social science department and the proper relationship between the faculty and the administration within the college. Such speech does not trigger First Amendment protection."

Connick pragmatically recognizes that governmental offices cannot be expected to operate either efficiently or in an uninhibited manner if each and every personnel decision, no matter how picayune, is a fit matter for federal litigation under the First Amendment (with all attendant diversions of time, concern and expense). Drawing a line between that speech which is *protected* (requiring the trial court to engage in the *Pickering* "balancing") and speech which is *not protected* (judicial "balancing" *not* required), this Court said:

> "When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment. Perhaps the government employer's dismissal of the worker may not be fair, but ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not subject to judicial review even if the reasons for the dismissal are

alleged to be mistaken or unreasonable." *Connick, supra*, 461 U.S. at 146-147.

With respect to Petitioner's seeming contention that the internal affairs of a college or academic department of a public university are *ipso facto* matters of public concern, *Connick* tells us that:

> "To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark—and certainly every criticism directed at a public official—would plant the seed of a constitutional case. While as a matter of good judgment, public officials should be receptive to constructive criticism offered by their employees, the First Amendment does not require a public office to be run as a round table for employee complaints *over internal office affairs*." *Connick, supra*, 461 U.S. at 149 (emphasis added).

Connick tells federal courts that in determining whether or not speech involves "matters of public concern" for purposes of constitutionalizing personnel decisions, they should consider the content, form and context of the speech. *Connick, supra*, 461 U.S. at p. 147-148. This is, of course, precisely what the district court did in this case, with painstaking detail. *See Ballard v. Blount*, 581 F.Supp. 160, 162-165 (N.D.Ga. 1983). We would respectfully suggest that under *Connick* the district court could not have rationally reached any other decision than that which it did reach—that the speech, as described by Petitioner himself, was uttered "not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest", *see Connick, supra*, 461 U.S. at 147. Indeed the *Connick* rationale would if anything appear to apply even more strongly here than it did in *Connick*. In contrast to the termination of employ-

ment involved in *Connick* we have here such relatively unimportant concerns as the size of some of the annual salary increases Petitioner has received.

The district court's decision in this case was, as we see it, not merely authorized, but was indeed compelled by the standards enunciated by this Court in *Connick*. The summary affirmance by the Court of Appeals for the Eleventh Circuit was plainly correct and is not deserving of plenary review by this Honorable Court.

(b) **Petitioner's suggestion that the decision below involves a conflict between the circuits on the proper application of *Connick* is inaccurate.**

Petitioner's contention that the opinion below results in a conflict between the circuits on the proper application of *Connick* is incorrect. Even the most superficial reading of *McGee v. South Pemiscot School District*, 712 F.2d 339 (8th Cir. 1983), the case upon which Petitioner chiefly relies to show inter-circuit conflict, reflects an entirely dissimilar factual situation. It is true that the *content* of the speech in *McGee*, *i.e.*, whether or not to continue a junior high school track program, might well appear, if viewed in a vacuum, to involve the same sort of internal academic disputation here held not to be a matter of public concern. But as *Connick* points out, the "context" as well as the "content" of speech must be considered. In *McGee* the speech was not merely the sort of routine, in-school disagreement heard at any faculty meeting. The matter had become the subject of *public* controversy, had been reported in the media, and was indeed an issue in a local election campaign. Moreover, the "form" of the speech (also relevant under *Connick*) was a letter to the editor of a local newspaper in which the plaintiff teacher was taking exception to certain prior newspaper articles concerning his reported views on the matter. As the Court

of Appeals for the Eighth Circuit pointed out in distinguishing *Connick:*

> "We have before us a case where the plaintiff wrote a letter to a newspaper about an issue that *had already been publicly aired by the defendants.*" 712 F.2d at 342-343n.4 (emphasis added).

The other cases cited by Petitioner are similarly distinguishable in terms of the *content, form* and *context* of the speech involved. *Gonzalez v. Benavides*, 712 F.2d 142 (5th Cir. 1983), as *McGee*, involved a controversy which was in fact "public", with public reprimands and denials having been disseminated through the local media. 712 at 144-145. *Czurlanis v. Albanese*, 721 F.2d 98 (3rd Cir. 1983), involved an employee speaking out at a public meeting of a county board, criticizing false reporting, inefficiency and improper expenditures of county funds by the county agency for which he worked. Entirely consistent with the "content, form and context" standards of *Connick* the Court of Appeals concluded that this speech *at a public meeting* of the County Board was made as a concerned citizen and taxpayer not as an aggrieved employee. 721 F.2d at 104. Finally, in *Bowman v. Pulaski County Special School District*, 723 F.2d 640, 644 (8th Cir. 1983), the Court of Appeals expressly noted that the speech in question arose in the context of *public debate* over the alleged excessive use of corporal punishment rather than in the context of an internal office grievance.

Actually, where the facts have at all resembled those involved in the case at bar, the decisions of the lower courts would appear to have uniformly reached the same results we see here. *See, e.g., Jordan v. Board of Regents, University System of Georgia*, 583 F.Supp. 23, 28 (S.D.Ga. 1983), *aff'd.*, 727 F.2d 1114 (11th Cir. 1984); *Cook v. Ashmore*, 579 F.Supp. 78, 83-84 (N.D.Ga. 1984); *Landrum v.*

Eastern Kentucky University, 578 F.Supp. 241, 245-247 (E.D.Ky. 1984). Indeed one federal district court would appear to have reached a like conclusion in a virtually indistinguishable factual situation. In *Mahaffey v. Kansas Board of Regents*, 562 F.Supp. 887 (D.Kan. 1983), a college professor similarly attempted to obtain federal judicial review of his merit salary increases, committee assignments, and size of his office under the First Amendment. The particular speech pointed to by Professor Mahaffey, much like that in the present case, consisted of his criticism of certain administrative decisions within his academic department as well as of a College administrative reorganization which resulted in his specialty, park management, being placed within the Department of Forestry. Applying *Connick*, the district court concluded that speech relating to internal operating policies and affairs of the college was a matter of individual, not public concern, and that the faculty member could not bootstrap his individual grievance into a matter of public concern by invoking a supposed popular interest in all aspects of the way public institutions are run. 562 F.Supp. at 890.

In summary, there is no conflict between the circuits as to the application of *Connick* in the sort of factual situation we have in this case.

2. Even were the Court disposed to overrule or limit its decision in *Connick*, or, were it for any other reason to conclude that *Connick* was not controlling as to Dr. Ballard's case, the petition for certiorari should be denied in that the judgment of the district court, affirmed by the Court of Appeals, was in fact correct and affirmable on each of three alternative grounds.

It has long been settled that if the ultimate decision and judgment of a trial court is correct for any reason appearing in the record, it is affirmable on appeal even though

the trial court may have predicated its correct result on erroneous grounds. *See, e.g., J. E. Riley Investment Co. v. Commissioner*, 311 U.S. 55, 59 (1940); *Morris v. Travisono*, 707 F.2d 28, 32 (1st Cir. 1983); *Bickford v. International Speedway Corporation*, 654 F.2d 1028, 1031 (5th Cir. Unit B, 1981). In this case Respondents (defendants below) were plainly entitled to the entry of judgment in their favor on each of three alternative grounds wholly without regard to *Connick*. We therefore submit that even were the Court disposed to reconsider *Connick* (and we hope this isn't the case), this particular petition for a writ of certiorari doesn't present an appropriate vehicle for reconsideration.

(a) **Facts of record show that should *Connick* be disregarded and Petitioner's speech held to be protected, the judgment below would still be correct and affirmable under *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977).**

Assuming *arguendo* that *Connick* were for any reason to be held inapplicable to Petitioner Ballard's situation, with his speech on internal "academic policy"[2] held protected under the First Amendment for purposes of constitutionalizing even such relatively less important personnel decisions as the size of one's pay raise,[3] the entry of judgment in favor of Respondents was nonetheless

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[2] *See* Petition for a Writ of Certiorari, p. i.

[3] Implicit in *Connick* is recognition of the fact that perhaps the first step in answering the question of whether or not particular speech is "protected" is to ask yet another question: "Protected for what purpose?" (*i.e.*, the significance of context as well as content). Bad grammar and expressions of irrational thought may well be

correct and properly affirmable under *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). *Mt. Healthy* requires a plaintiff who attacks an adverse personnel decision by pointing to speech which he contends is protected by the First Amendment to meet two critical tests to prevail. 429 U.S. at 287; *Leonard v. City of Columbus*, 705 F.2d 1299, 1303-1306 (11th Cir. 1983).

The first test, again assuming the protected nature of the speech, is whether the *plaintiff* has carried his burden of proving that the speech was *in fact* a motivating factor concerning the personnel decision about which he complains. The second test is whether the *defendant* has carried his burden of proving, as an affirmative defense, that the complained of personnel decisions would have been the same had the constitutionally protected speech never occurred. *Ibid.* Based upon the facts of record in this case, each of the two tests would call for affirmance of the district court's entry of judgment in favor of the Respondents.

Looking at the first test (whether Petitioner's speech had anything to do with the size of his salary increases, curtailment of the linguistics program, or any of the less significant personnel matters he has mentioned), Dr. Ballard wholly failed to come forth with any *factual* evidence (as distinguished from naked allegations) of any linkage between the speech and personnel decisions to which he has pointed. To the contrary, such evidence as

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protected by the First Amendment for purposes of the offender's imprisonment, but at the same time *unprotected* for purposes of adverse personnal actions in a University's English or Philosophy departments.

Dr. Ballard did present was more or less supportive of Respondents' testimony that his slightly less than average merit salary increases were based upon his department chairman's perception of his somewhat less than average teaching performance in *English*, and in no way affected by Dr. Ballard's perfectly normal faculty criticism as to how the English Department and College of Arts and Sciences were being run. Petitioner Ballard conceded, for example, that he was less qualified to teach English Composition than the area of his particular expertise, linguistics. Dep. Ballard, pp. 7, 9. He conceded that he did not believe that the faculty committee which had looked into the matter and upheld his department chairman's pay raise determinations, had been motivated by a desire to retaliate against him because of his criticism of certain aspects of departmental policy. Dep. Ballard, p. 48. Moreover, Petitioner seemingly accepted the truthfulness of Respondents' testimony that they viewed his criticisms as having been well within the established norm of an academic atmosphere which in fact encouraged constructive criticism of both academic policy and the decision of academic policymakers. At page 2 of his Petition to this Honorable Court for a writ of certiorari, Dr. Ballard states:

> "The express policy of the Georgia State University English Department, as articulated by the Defendant Blount, was to encourage the faculty to offer fair criticism and constructive suggestions regarding academic policy so as to develop a broad base upon which to establish and implement such policy."

The record discloses that Dr. Ballard failed to come forth with any evidence which could even conceivably have supported a judicial finding that the reasons stated by Respondents for the complained of personnel decisions,

corroborated by both documentary and testimonial evidence, were pretextual.

Looking to the second test, Dr. Blount testified positively that faculty criticism of how the English Department and College of Arts and Sciences were being run was quite normal, and that he in fact did not recall Petitioner as being any more critical than faculty members generally. He testified positively that had Dr. Ballard done naught but praise everything that had ever been done in the English Department, the personnel decisions in question would have been precisely the same. Dep. Blount, pp. 104-105. Petitioner Ballard again introduced no evidence whatsoever to refute this positive testimony, testimony corroborated by the findings of the faculty grievance committee as well as supported by performance reports and student complaints concerning Dr. Ballard's teaching of freshman English Composition. Even if the speech in question were fully "protected", in other words, *Mt. Healthy* dictates that since the attacked personnel decisions would have been the same with or without the "speech" in question, the ultimate judgment in favor of the Respondents was plainly correct and properly affirmable on this ground as well.

(b) **Facts of record demonstrate an absence of federal jurisdiction under the "case or controversy" limitations of Article III of our Constitution—namely a want of any judicially ascertainable, "injury in fact" to Petitioner.**

Since the First Amendment applies to the States and State agencies solely by virtue of the "due process" clause of the Fourteenth Amendment, *e.g.*, *Hughes v. Superior Court of California*, 339 U.S. 460, 462 (1950); *Gitlow v. New York*, 268 U.S. 652, 666 (1925), it would

seem to follow that before a plaintiff can make out a First Amendment case against a *State* agency or official on the basis of a personnel decision, the plaintiff must show that he has been deprived, in some tangible way, of either a "liberty" or "property" interest protected by the "due process" clause—in other words that he has suffered some actual injury in fact, not theory. *See, Paul v. Davis*, 424 U.S. 693, 701-712 (1976); *Board of Regents v. Roth*, 408 U.S. 564, 569-575 (1972). This requirement of actual injury to a property or liberty interest would appear to be but an application in the "due process" sense of the Article III requisite of some tangible and non-theoretical "injury" to support federal jurisdiction. *See, e.g., Warth v. Seldin*, 422 U.S. 490, 499 (1975); *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 218-219 (1974).

That the jurisdictional limitations of Article III apply to actions predicated on the First Amendment was recognized by the Court in *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972). *See also, e.g., National Student Association v. Hershey*, 412 F.2d 1103, 1113-14 (D.C. Cir. 1969). In the case at bar Petitioner Ballard has in fact received pay raises. His complaint is that the increases haven't been big enough. But under a merit approach to salary increases there obviously isn't any legal entitlement to an increase of any particular size. The fact that Dr. Ballard's pay raises have not been as large as he would have liked does not give rise to a *property* interest in a bigger salary. Similarly, there is no evidence to show that he has ever been prevented from saying anything at all that he wanted to say. There is no "prior restraint". No *liberty* interest is involved. At best Petitioner would be able to argue the existence of a subjective "chill". This isn't an adequate substitute for the Article III requisite of injury *in fact.*

See Laird v. Tatum, supra.

(c) **Relitigation of the controlling evidentiary conclusions of the faculty grievance committee would be inappropriate under *Board of Education of Rogers, Arkansas v. McCluskey*, 458 U.S. 966 (1982).**

As already noted, Petitioner had a hearing before a faculty grievance committee concerning his salary complaint and the faculty committee found against him. R. 227-230. The committee expressly found that the attrition rates in Dr. Ballard's English 112 courses seemed to be excessive, and found that Petitioner's department chairman, Dr. Blount, in fact based his evaluation of Dr. Ballard's performance for salary increase purposes upon his perception of poor performance in the teaching of English 112 as evidenced by a high drop-out rate and large number of student complaints. The Committee noted that Dr. Ballard's assignments in English (as opposed to his area of expertise, *i.e.*, "linguistics") had resulted from insufficient enrollment in linguistics. The Committee concluded that there was no proof that Dr. Blount had been "arbitrary, capricious or unfairly discriminatory in his 1977-80 recommendations for Dr. Ballard's salary increases, teaching assignments, or released time". It recommended that Dr. Ballard's salary requests be denied, pointing out that Dr. Ballard had himself claimed no more than "average" merit, and that his current salary in fact placed him close to the average for his rank within his department. Dr. Ballard expressly disclaimed any prejudice against him on the part of the grievance committee. Dep. Ballard, p. 48.

In *Board of Education of Rogers, Arkansas v. McCluskey*, 458 U.S. 966, 969 (1982), this Court said that:

> "§ 1983 does not extend the right to relitigate in federal court evidentiary questions arising out of school disciplinary proceedings or the proper construction of school regulations."

Under the authority of *Board of Education of Rogers, Arkansas*, Respondents respectfully suggest that it would have been inappropriate for the district court to have relitigated these controlling evidentiary conclusions of the faculty grievance committee, and that for this reason too the entry of judgment in favor of Respondents was correct, properly affirmable, and is unworthy of plenary review by the Supreme Court of the United States.

CONCLUSION

For all of the reasons stated Respondents submit that the judgment below was plainly correct, that there is in fact no conflict between the circuits as contended by Petitioner, and that no reason exists for this Honorable Court's grant of a writ of certiorari and plenary review of the question of whether or not Petitioner's pay raises have been large enough.

Respectfully submitted,

MICHAEL J. BOWERS
Attorney General

JAMES P. GOOGE, JR.
Executive Assistant Attorney General

H. PERRY MICHAEL
First Assistant Attorney General

JIM O. LLEWELLYN
Senior Assistant Attorney General

ALFRED L. EVANS, JR.
Senior Assistant Attorney General

PLEASE ADDRESS ALL
COMMUNICATIONS TO:

ALFRED L. EVANS, JR.
Senior Assistant Attorney General
132 State Judicial Building
Atlanta, Georgia 30334

Telephone: (404) 656-3389